

# Ministerial guidelines for certification of specialist e-cigarette retail premises

June 2017

## Introduction

From 1 August 2017, the *Tobacco Act 1987* (Tobacco Act) prohibits the display of e-cigarette products in retail outlets. In recognition of the **small number** of businesses that predominantly sell e-cigarette products, an exemption from the e-cigarette display ban has been allowed for certified specialist e-cigarette retailing premises in operation on and from 1 September 2016. Certified specialist e-cigarette retailing premises will be permitted a **limited** point of sale display of e-cigarettes and e-cigarette accessories within their premises.

The Minister for Health has adopted the following guidelines which stipulate the criteria for certification and the process for regulating certified businesses. They should be read and understood by both those wishing to apply for certification and those who hold a certificate.

The Ministerial guidelines specify action by the Secretary of the Department of Health and Human Services (the Department), who is the most senior public servant at the Department, and the Secretary's delegates, who are other senior public servants in the Department.

## Purpose

The purpose of these guidelines is to:

- create a small number of additional certification requirements, in addition to those requirements contained in the Tobacco Act. These additional requirements are the same as those that applied previously to the certification of specialist tobacconists
- assist businesses that sell e-cigarettes to understand the criteria for certification and process for certification
- explain the decision making processes by the Department when assessing applications and managing the ongoing regulation of certified businesses.

## Criteria for certification

### Objectives

The objective of the criteria specified in these guidelines is to:

- ensure that the exemption is only available to a small number of businesses that specialise in the sale of e-cigarette products and who were in operation on and from 1 September 2016
- ensure that children and young people are not exposed to e-cigarette promotions
- prevent members of the public from being required to enter these premises on a regular basis to access other goods and services
- ensure that certificate holders are fit and proper and that their businesses comply with relevant e-cigarette legislation.

## Criteria for certification specified under the Tobacco Act

Section 15U of the Tobacco Act states that:

- "(2A) The Secretary may certify that premises are a specialist e-cigarette retailing premises if the Secretary is satisfied that—
- (a) an e-cigarette retailing business is carried on at the premises; and
  - (b) the e-cigarette retailing business has been carried on at the premises on and from 1 September 2016; and
  - (c) the e-cigarette retailing business predominately sells e-cigarette products; and
  - (d) certification of the premises is consistent with the objects of this Act; and
  - (e) certification of the premises is consistent with any strategic plan, policy statement, code or guideline relating to specialist e-cigarette retailing premises that has been adopted by the Minister; and
  - (f) the premises are separated from other retail premises by a wall and that any doorway or entrance to or exit from the premises does not open directly into any other retail premises."

## Criteria for certification and ongoing obligations adopted by the Minister for Health

In addition to the criteria specified under the Tobacco Act, the Minister for Health has adopted the following additional criteria which must be met by each e-cigarette retailing business premises prior to the grant of certification. These additional requirements are modelled on those that applied previously to the certification of specialist tobacconists. The obligations also remain after a certificate is granted and must continue to be met while the business remains certified.

The business must:

- have derived 80 per cent or more gross turnover from the sale of e-cigarette products at the individual premises subject to the application in the 12 months immediately preceding the application (or since the commencement of trading if that is less than 12 months prior) and, once an application has been granted, continue to derive 80 per cent or more gross turnover from the sale of e-cigarette products in any 12 month period at the individual certified premises;
- comply with the Victorian Tobacco Act, Commonwealth *Therapeutic Goods Act 1989*, Victorian *Drugs, Poisons and Controlled Substances Act 1981* and *Drugs, Poisons and Controlled Substances Regulations 2017*;
- not sell products or services for children or adolescents;
- not sell dairy products, bread and bakery products, breakfast cereals or food or beverages other than low-risk, shelf stable foods and beverages;
- clearly identify itself as a specialist e-cigarette retailing premises through the use of external branding containing the words: e-cigarette and/or electronic cigarette and/or vape and/or vaping or similar words and symbols;
- not identify itself as a newsagent through external or internal branding and only sells local, state, and national/daily/weekly newspapers and e-cigarette related publications;
- only display a maximum of four metres squared (4m<sup>2</sup>) of e-cigarette and e-cigarette accessory products;
- only display one of each 'product line' of each e-cigarette and e-cigarette accessory product;
- use price boards and price tickets as prescribed in the Tobacco Regulations 2017 (Tobacco Regulations);
- display only one "We Sell E-cigarette Products Here" sign, as prescribed in the Tobacco Regulations; and
- once certified, display the certificate of certification as a specialist e-cigarette retailing premises at all times in the relevant premises.

**Once certified, certificate holders must advise the Secretary or delegates of the Department if they cease trading, relocate their business to another premises or fail to meet any of the other ongoing requirements on certified specialist e-cigarette retailing premises.**

## Granting a request for certification

Under section 15U(2A) the Secretary may certify premises if they meet the criteria under the Tobacco Act and these Ministerial guidelines.

In line with this legislative requirement, the process for granting certification is as follows:

1. Proprietors who wish for their business premises to be considered for certification as a specialist e-cigarette retailing premises complete a Certified specialist e-cigarette retailing premises: Application for certification (the application form). The application form requires applicants to demonstrate how they meet the criteria in the Tobacco Act and these Ministerial guidelines.
2. An initial desktop assessment of an application is conducted by the Department. If the application demonstrates that the requirements of the Tobacco Act and these Ministerial guidelines may be met, the case is then referred to local council for further investigation.
3. A local council authorised officer will inspect the premises. During the inspection the local council authorised officer will determine whether the premises meets the criteria outlined in Tobacco Act and these Ministerial guidelines. For example, the local council authorised officer will determine whether the retailing premises sell dairy products.
4. The local council will then provide their findings to the Department and confirm whether the premises meets the required criteria. The Secretary or their delegate will then review all of the relevant information associated with the application and decide whether the application meets the criteria for certification.
5. If certification is granted, the Department will write to the applicant and provide them with certification as a specialist e-cigarette retailing business, within 7 days of this decision being made.

## Refusing a request for certification

Under section 15U(3) of the Tobacco Act, the Secretary may refuse to grant a certification request if:

- the applicant has not complied with a requirement of the Tobacco Act or Tobacco Regulations; or
- the Secretary is not satisfied that the premises meets the criteria set out in section 15U(2A).

Section 15U(5) states that the Secretary must give the applicant an opportunity to make written submissions before refusing to certify a premises.

In line with these legislative requirements, the process for refusing an application is as follows:

1. Proprietors who wish for their business premises to be considered for certification as a specialist e-cigarette retailing premises complete the application form. The application form requires applicants to demonstrate how they meet the criteria in the Tobacco Act and these Ministerial guidelines.
2. An initial desktop assessment of an application is conducted by the Department. If the application demonstrates that the requirements of the Tobacco Act and these Ministerial guidelines have not been met, the Department will write to the applicant and advise that the Secretary or their delegate is considering refusing the applicant. The letter to the applicant will specify which requirement/s for certification have not been met and provide the applicant with 30 days to make a further written submission, from the date of receipt of the letter from the Department.
3. If the Department's concerns are not addressed and the criteria for certification are not met, the Secretary or their delegate will then review all of the relevant information associated with the application and decline the request for certification. In these circumstances the Department will write to the applicant and advise them that their application has been formally refused within 7 days of this decision being made. If the applicant believes this decision is incorrect, they can apply for internal review of the decision.

4. If the Departments' concerns are addressed in the second written submission, and the certification requirements appear to be met, the application will then be referred to local council for further investigation.
5. A local council authorised officer will inspect the premises. During the inspection the local council authorised officer will determine whether the premises meets the criteria outlined in Tobacco Act and these Ministerial guidelines. For example, the Local Council may determine that the retailing premises sell dairy products.
6. The local council will then provide their findings to the Department. The Secretary or their delegate will then review all of the relevant information associated with the application and decide whether the applicant will receive certification.
7. If the requirements of the Tobacco Act and these Ministerial guidelines are not met, certification will be refused. In these circumstances the Department will write to the applicant and advise them that their application has been formally refused, within 7 days of this decision being made. If the applicant believes this decision is incorrect, they can apply for internal review of the decision.
8. If the applicant requests internal review, the application will be assessed by someone other than the person who made the initial decision. The Secretary or their delegate will then advise the applicant whether certification has been granted or refused, within 7 days of the decision being made.

## Cancelling an existing certification

The Secretary may cancel certification under section 15X(1) of the Tobacco Act if:

- the certification holder has not complied with a requirement of the Tobacco Act or Tobacco Regulations; or
- the premises no longer satisfy the criteria set out in section 15U(2A).

Section 15X(3) states that, before cancelling a certification under subsection (1), the Secretary must give the certification holder an opportunity to be heard.

In line with these legislative requirements, the process for cancelling an existing certification is as follows:

1. If the Department becomes aware of possible grounds to cancel an existing certification, the Secretary or their delegate will write to the certificate holder outlining the grounds for cancelling the certification and the facts known to the Department in relation to the matter. The correspondence will inform of the decision in contemplation and advise the certificate holder that they have 30 days from receipt of the correspondence to make a further written submission.
2. If, after receiving the written submission, the Secretary or their delegate forms the view that the certificate holder has not complied with a requirement of the Tobacco Act or Tobacco Regulation or the premises no longer satisfy the criteria set out in section 15U(2A), the Department will write to the certificate holder within 7 days of the decision being made and advise them that their certification will be cancelled in 30 days from receipt of correspondence from the department, unless internal review is requested.
3. If internal review is not requested, the certification will be cancelled 30 days from the date on which the applicant received the correspondence from the Department.
4. If the applicant requests internal review, the application will be assessed by someone other than the person who made the initial decision. The Secretary or their delegate will then advise the applicant whether certification has been cancelled or not, within 7 days of this decision being made.

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## Considerations in the decision making process

### Failure to comply with the Tobacco Act and Tobacco Regulations

The first ground for refusing or cancelling a certificate relates to the applicant/certificate holder having not complied with the Tobacco Act or Tobacco Regulations under s 15U(3)(a) or section 15X(1). The decision to refuse or cancel a certificate will be determined on a case-by-case basis.

The decision to refuse or cancel a certificate will only be considered in instances where the relevant authority has issued the applicant/certificate holder with a formal warning or infringement notice, or where a prosecution against the applicant/certificate holder has resulted in a guilty verdict. Prosecutions that result in a guilty verdict in a court of law will generally carry more weight than an infringement notice or formal warning.

The following factors will be considered and investigated by the Department in the decision making process:

- The nature, intent, extent and frequency of any identified breach of the Tobacco Act.
- Defences available to a certificate holder under Section 12(4) of the Tobacco Act including:
  - the manager had no knowledge of the primary offence; and
  - the manager had taken preventative measures in relation to the primary offence.
- Statements, interviews, copies of warnings/infringements notices, prosecution results and any other available evidence provided by local government Environmental Health Officers or Tobacco Inspectors.
- Opportunity given to the certificate holder to rectify any breach of the Tobacco Act.
- Individual facts and circumstances of the certificate holder.
- Submissions and explanations from the certificate holder.

### Failure to comply with the criteria in section 15U(2A)

The second grounds for refusing or cancelling a certification relate to a failure to conform to criteria under section 15U(2A) including guidelines adopted by the Minister under subsection (e). Apart from the criteria in relation to gross turnover of e-cigarette products sold from the premises, these grounds for refusal or cancellation relate to the physical premises themselves. Cancellation or refusal of certification under section 15X(1)(b) and 15U(3)(b) will be determined on a case-by-case basis.

The following factors will be considered and investigated by the Department in the decision making process under these sections:

- The nature, intent, extent and frequency of any identified non-conformity with the criteria set out in section 15U(2A).
- Statements, photos and other available evidence to assist establishing whether the premises no longer conforms with the criteria under section 15U(2A).
- Opportunity given to the certificate holder to rectify any identified non-conformity.
- Individual facts and circumstances of the certificate holder.
- Submissions and explanations from the certificate holder.

## The role of local government

Applications for certification as a specialist e-cigarette retailing premises are initially assessed through a desk-top assessment by the Department with accompanying documentation. Further information to support the assessment may also be requested.

Each eligible premises is then referred to a local government Environmental Health Officer or Tobacco Inspector for a site inspection. This inspection serves to verify the information supplied in the application and confirm that the premises otherwise meets the eligibility criteria. The premises must also comply with the requirements under Tobacco Act and Tobacco Regulations, the Commonwealth *Therapeutic Goods Act 1989*, Victorian *Drugs, Poisons and Controlled Substances Act 1981* and the *Drugs, Poisons and Controlled Substances Regulations 2017*.

The Department also receives regular feedback from local government with respect to non-compliance matters, including any breach of the Tobacco Act. From 1 August 2017, this could include information relating to the failure to comply with the criteria specified in section 15U(2A) of the Tobacco Act.

Upon the refusal or cancellation of certification the local government council in which the premises operates will be informed of the decision.

## Certification transfer policy

The Tobacco Act states that a specialist e-cigarette retailing business must have been conducted at the premises on and from 1 September 2016. **Certification can therefore not be transferred to a different address or a different corporation. The Tobacco Act places a similar requirement on certified specialist tobacconists.**

## Record keeping

All information relevant to the decision will be recorded, maintained and made available to the certificate holder on request.

## Requirements for non-certified e-cigarette retailing premises

Until certification is received, from 1 August 2017 businesses must cover all e-cigarette products. If your application for certification has not been assessed or has been refused, all e-cigarette products must be covered.

## Further information

For further information please call the Tobacco Information Line on 1300 136 775.

To receive this publication in an accessible format phone 1300 136 775 using the National Relay Service 13 36 77 if required, or email [tobacco.policy@dhhs.vic.gov.au](mailto:tobacco.policy@dhhs.vic.gov.au)

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